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Quod Omnes Tangit: Consent Theory in the Radical Libertarian Tradition in the Middle Ages

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The origin of natural rights thinking and "the doctrine of consent . . . [are] drawn from a long tradition in ancient and medieval thought." In fact, the idea of consent played "an increasingly important role" in political, legal, and religious thought during the Middle Ages (Sigmund 1963, p. 138). Nearly every important jurisprudential work of the medieval world contained at least some passing reference to consent (Tierney 1982, p. 42).

In "Oh, Ye Are for Anarchy!" (Watner (1986, pp. 111–37) John Ponet's 1556 tract, *A Short Treatise of Politike Power* was cited as containing "the earliest glimmerings of consent theory in English history." However, it is clear to me now that Ponet was pointing to a much older tradition. Citing civil and canon law, as well as the Old Testament story of Naboth refusing to sell his vineyard to the king, Ponet wrote that "Neither pope, Emperor, nor king may do any thing to the 'hurt' of his people without their consent" (Hudson 1942, pp. 137, 140).

Although Ponet did not refer to the maxim of private Roman law, *quod omnes tangit, ab omnibus approbetur* (whatever touches all, must be approved by all), this principle was applied over and over by canonists, Catholic theologians, and medieval thinkers of the Middle Ages. Modern scholars, the most notable example being Brian Tierney (1997, p. 286) of Cornell University, concur that the consent and natural rights theories "had deep roots in" the Middle Ages. These are the centuries stretching from the collapse of Rome to the end of the 1400s. It was during this "medieval period—in particular, during the centuries from the eleventh onward—that the

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foundations were laid on which the edifice of Western cultural peculiarity was subsequently erected" (Oakley 1988b, p. 7).

However, medieval thinkers were not totally original. The Stoic doctrine of the natural equality of men "exercised a great influence through the Christian Fathers." Roman law, especially the principle of *quod omnes tangit*, was influential when it was studied and applied by the medieval glossators and conciliarists. Medieval commentators were familiar with:

- Aristotle's concept of the right of the community to participate in its government;
- the German idea of *Genossenschaft*, which embraced the right of the tribal group to select its own leaders; and
- the Judeo-Christian notions of moral autonomy.

In this article, medieval thinkers will be explored and how they dealt with these ideas, and developed them into the concept that "political legitimacy is grounded in the free consent of the governed" (Oakley 1988a, pp. 211–12).[1]

RIGHTS AND CONSENT

There are grounds for debating what exactly medieval thinkers meant when they referred to "consent," and what they meant when they applied that term to their political societies. However, there is no question that the idea of individual rights played a fundamental part in their thinking. It is safe to say that, as early as the 1180s, the canonists found within the *jus naturale* a zone of personal autonomy and a neutral sphere of personal choice (Reid 1991, p. 50).

In the *Decretum* of Gratian (circa 1140), which has been referred to as "the first comprehensive and systematic legal treatise in the history of the West," the author discussed the role of freedom in the contract of marriage, and "rejected the notion that coerced consent could validate a marriage" (Tierney 1982, p. 56). The canon lawyers built a structure of law around Gratian's recognition that coerced consent was no consent at all. Pope Alexander III (1159–1181) issued a decretal, *Cum locum*, which opened

> with the broad statement of principle that "since consent has no place where fear or compulsion intervenes, it is necessary where someone's assent is required [that] the stuff of compulsion [must] be repelled." . . . [He] recognized that true consent can only be

[1]Also see Watanabe (1963, p. 45).

> voluntary and that coercion has no place where consent is a requirement. (Reid 1991, pp. 72–76)

The arguable point is how medieval thinkers conceived the concept of consent in relation to the individual's obligation to those who ruled over him or her. Most medieval thinkers agreed that the existence of the political community had to be explained by the prior consent of individuals. In other words, they believed that "political obligation derive[d] from the consent of those who create[d] the government" under which they lived. The debatable question was whether the formation of a political community required a unanimous decision. If individuals were living in a state of nature before the existence of political societies, were they required to unanimously assent? Or could a majority of individuals impose their will on the minority, and create a political entity which included them even though they had not agreed to membership in it? Unfortunately, this question seems not to have been directly addressed by medieval theorists (Tierney forthcoming).

Quod Omnes

Medieval thinkers distinguished between two possible meanings of consent: either as an expression of the corporate will of the community (e.g., majority rule) or as a concatenation of individual wills. The canonists

> made an important distinction between rights that were common to a group of persons as individuals (*ut singulis*) and those common to a group as a corporation (*ut collegiatis*). When rights belonged to separate individuals, the consent of each one was needed; when they belonged to a corporate whole, a majority would suffice. (Tierney 1995, p. 87)

Literally interpreted, *quod omnes* meant that all the members of a corporation had the right to consent to the act of the corporate body. Thus,

> the dissent of one member was enough to make an action impossible. And this was the interpretation if the individual rights of the members were touched but not the corporate right of the whole body. But when something touched the rights of the corporation as a whole, (Tierney 1995, p. 87)

majority rule was applied. What was approved by the majority sufficed to bind the corporation. In such cases, a dissenting minority could not prevent corporate action, or claim, "after the decision was made, that the act did not bind them." Thus, for example, the canonists maintained at the beginning of the thirteenth century that when a general church council was called

> to consider matters of faith, even lay people could be summoned to attend since the faith was common to all and "what touches all ought to be discussed and approved by all." (Post 1964, p. 212)

Kings and emperors also referred to *quod omnes*. In 1244, Emperor Frederick II cited it directly in his letter summoning an imperial council to meet in Verona, and King Edward I of England used it in his convocation of Parliament in 1295 (Post 1964, p. 212).

The principle of "*ut quod omnes similiter tangit, ab omnibus comprobetur*" cited in Justinian's Code (5, 59, 5, par. 2–3) around 534 A.D. broadly formed the foundation for the legitimacy of the phrase's usage. The maxim was first used to clarify the rights of several guardians over the disposition of jointly owned property (Post 1964, p. 164).[2] "[F]rom its humble beginnings in Roman private law" *quod omnes*

> bec[a]me an important concept in the legal history of the Middle Ages. The canonists first used this principle to define the legal relationship between a bishop and his chapter of canons. Later, the maxim was introduced into ecclesiastical government where it supported the rights of the lesser members of the ecclesiastical hierarchy to have a hand in the governing of the church. (Pennington 1970, p. 157)

Innocent III (1198–1216) recognized the importance of the maxim, and it was he who probably brought it into canon law.

> The wording of the maxim varied from time to time, . . . but its importance in medieval political thought as well as canon law is undeniable. It was quoted by such conciliarists as Guilielmus Durandus the Younger, Marsilius of Padua, [and] William of Ockham. (Watanabe 1963, p. 53)

The use of the maxim *quod omnes* was not limited to church lawyers.

> [B]y the beginning of the fourteenth century, kings all over Europe were summoning representative assemblies of their noblemen, clergy, and townsmen. When they did, the reason they often gave for calling such assemblies was, "what touches all must be approved by all." (Pennington 1970, p. 157)

The need that representative assemblies met was a need felt by all who govern. The need was to secure as large a degree of public support as possible, and this was "felt with particular acuteness by medieval rulers . . . by popes as well as kings" (Oakley 1988b, pp. 130–31).

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[2]See also Sigmund (1963, p. 71).

The church had already

> developed its own practice of holding representative councils out of a deep rooted conviction that the whole Christian community was the surest guide to right conduct in matters touching the faith and well-being of the church. (Tierney 1995, p. 85)

Plena Potestas

In order for the medieval system of representation to emerge, the canon and civil lawyers of the Middle Ages had to develop an adequate legal theory of agency. They accomplished this by falling back on another principle of Roman law, known as *plena potestas* (full power) or *plena auctoritas* (full authority). In classical Roman law, this was used to "define the scope of a proctor's authority when he appeared in court on behalf of his principal."

However, since Roman law itself had not developed an adequate theory of agency (under Roman law, an agent could not bind his principal to an agreement made by the agent with a third party), the canonists were impelled "to formulate a sophisticated law of agency in which the term *plena potestas* played a major part." The church, which was honeycombed with corporate bodies, such as "cathedral chapters, religious houses, colleges," and monasteries, accepted that "a proctor or representative equipped with a mandate of *plena potestas* could do all that his principal could have done if he (or they) had been present" (Tierney 1995, pp. 85–86; 1982, p. 23). The agent was fully empowered to bind the person or corporation that had appointed him.

What this idea meant to the European kings and rulers of the Middle Ages was that when they

> summoned representatives of their towns to an assembly, they wanted to be sure that the burgesses really would be bound by the votes of the persons they had elected, so gradually in the thirteenth century the use of *plena potestas* passed from canon law into constitutional practice. (Tierney 1995, p. 86)

Plena potestas, when combined with the maxim *quod omnes*, was transformed into a basic principle of representative government, and it was the "means of connecting the central government with the community of the realm," and of binding all the communities to any decision made for the common good (Post 1964, p. 158). In modern parlance, *plena potestas* would be referred to as a full power of attorney, and this was the means by which the medieval lawyers concluded that a matter that touched the whole community could be decided and approved by a representative assembly with power to act on behalf of all citizens (Tierney 1982, pp. 24–25).

Beginning with *omnes quod* and *plena potestas*, the idea of political representation and majority rule (the ability of the majority of a representative assembly to bind a minority of its members) had a long, slow growth. In medieval England, as Lysander Spooner argued, consent to taxation was originally "deemed to be not corporate, but personal." For example, in "1217, the Bishop of Winchester refused to pay a . . . [tax] on the grounds that he had not personally consented to it" (Clarke 1964, pp. 256–57; Spooner 1971, pp. 222–24).[3]

During medieval times, it was normal for the king to assemble his vassals and "request" their aid. Even though grouped together in an assembly, their consent was individual, and the consent of those present did not bind those who were absent; nor did the majority bind the minority. Yet, as taxes and scutages were continually granted to the king, they became customary, and once having become customary, the requirement that they be assented to by each individual vassal disappeared.

Furthermore, medieval kings saw the advantage of emphasizing procedural over individual rights, and incorporating concepts from the Roman law into their procedures to collect funds from their vassals. Under Roman law, consent was never individual, and "although it was based on the lawful rights of all individuals represented, . . . [their consent was] subject to the decision of the king in his capacity of supreme public authority in the realm" (Post 1964, pp. 163–64). If an individual chose to dissent and not pay a tax, he had the opportunity to a full defense of his rights in the king's court. "The consent to . . . [the court's] decision," however, "was in effect compulsory" (Oakley 1983, p. 315). To have concluded otherwise would have undermined the health of the state, and prevented the king from collecting taxes. This legal sleight of hand bolstered medieval rulers, as well as modern governments.

CONSENT AND THE CATHOLIC CHURCH

The history of the Catholic Church during the Middle Ages reflects not only the struggles between medieval monarchs and popes (to determine who ultimately had supreme authority), but also the important role of consent theory in elucidating the nature of power and control within the church itself. The Investiture Contest of the late eleventh and early twelfth centuries pitted the papacy against the Holy Roman emperors. The issue of who should appoint bishops and abbots was really a question about who should dominate the church: the pope or the emperor.

[3]See also, "Representation" (*Encyclopaedia Britannica*, pp. 163–64).

Although the outcome of this struggle seems to have been a compromise that slightly favored the church, the end result was that as soon as the Investiture Contest concluded, there began a series of general church councils beginning in Rome in 1123, and then at the Lateran in 1139 and 1179. By the time the Fourth Lateran Council was convened in 1213, it was already becoming an established principle that general church councils represented the whole church, and that even the papacy itself was bound by the canons of the General Councils.

The Conciliar Movement

Sparked by the Investiture Contest, during the late 1100s and early 1200s the canonists had already become concerned with the question of sovereignty within the Church. Was the pontiff or were the general councils which had been established by universal consent supreme? (Tierney 1966, pp. 1–17; 1995, pp. 74–75). To further exacerbate matters, the church was faced with a grave constitutional crisis late in the next century. In April 1378, Urban VI was elected to the papacy. His conduct led the cardinals to declare his election invalid on the grounds that it had been made under duress. Urban refused to acknowledge their authority to depose him. The cardinals proceeded to elect a new pope, Clement VII, who also failed to command universal allegiance. In order to resolve the dispute between the Italian supporters of Urban and the French backers of Clement, and their respective successors, it was eventually determined that a church council should be convened to elect a new pope. The supporters of this idea, that a general council had greater authority than a pope, became known as conciliarists. They believed that "the final authority in the Church . . . lay not with him [the Pope] but with the whole community of the faithful or with their representatives" (Tierney 1998, pp. 1–2; Oakley 1981, p. 787).[4]

At the heart of the conciliar movement was

> the belief that the pope was not an absolute monarch but rather in some sense a constitutional ruler that . . . possessed a merely ministerial authority delegated to him for the good of the Church.

The conciliarists developed arguments from Scripture, church history, canon law, and the Romano-canonistic tradition of representation and consent to support the idea of the superiority of councils over the pope. The importance of the conciliar movement was that it

[4]The dispute among popes is probably one of the earliest examples in Western political history of competing governments.

set a precedent for the medieval world. Conciliarist thinkers realized that governmental authority in the church must rest on the consent of the governed, and they were the first to apply this principle not only to the church but also to all "rightly ordained" political communities (Oakley 1983, pp. 318, 322).

The argument of the conciliarists—that councils were superior to the pope—was soon applied by advocates of the rights of the people against the despotism of kings. If a heretical pope could be deposed by the church in council, then a tyrannical king could be deposed by his barons. As one commentator expressed it:

> [The canonists] were faced with a central problem of constitutional thought. How could one affirm simultaneously the overriding right of a sovereign to rule and the overriding claim of a community to defend itself against abuses of power? . . . [They answered this by] trying to set up a framework of fundamental law which so defined the very nature and structure of the church that any licit ecclesiastical authority, even papal authority, had to be exercised within that framework. A text of Pope Gregory the Great, incorporated into the *Decretum*, provided a juridical basis for this development. Gregory asserted that the canons of the early general councils were always to be preserved inviolate because they were established by universal consent (*universali consensu*). He added that anyone who went against the canons "destroyed himself and not them." (Tierney 1982, p. 16)

The canonists were not afraid of applying their doctrine to actual situations in the real world around them. They imagined that a pope might become a heretic or commit sins almost as intolerable as heresy. John of Paris, a Dominican theologian writing in 1301, and Huguccio of Pisa (d. 1210), both held the pope accountable for the common good of the whole church: "Look!" they said:

> The Pope steals publicly, he fornicates publicly, he keeps a concubine publicly, he has intercourse with her publicly in a church, . . . and he will not stop when admonished. (Tierney 1982, p. 16)

Such charges were not so farfetched. Boniface VIII (1294–1303) was actually charged with these and other accusations of a serious nature.[5] In such cases, a pope could be deposed by a General Council. The principle of conciliar supremacy (a pope with a council is greater than a pope without a council) was clearly expressed in the decree *Sacrosancta* of the Council of Constance, and could be readily

[5]On Huguccio, see Tierney (1982). On John of Paris and Boniface VIII, see Kempshall (1999, p. 285).

extended from the ecclesiastical realm to the secular (Tierney 1998, pp. 5, 21)

Manegold of Lautenbach

Huguccio was not the first thinker to take this daring step. As we shall see, he was only one of many theologians who realized that the rules applicable to the governance of the church were equally applicable to the secular realm. Perhaps the earliest thinker to do this was an Alsatian monk, Manegold of Lautenbach, who died sometime between 1103 and 1119. Manegold lived during a time when Pope Gregory VII twice excommunicated King Henry IV (in 1076 and then again in 1080). This raised two thorny questions: "Was it possible for a king to be deposed? [and] What was the origin of royal power?" Manegold acknowledged that a king could be deposed, because the monarchy was elective and conditional, and subject to the reciprocal oaths of the coronation ceremony. Manegold observed that the king promised "to administer justice and maintain the law," just as the people swore fealty to him. He concluded that the oath of the people was "*ipso facto*" null and void if the king did not uphold his part of the bargain (Stead 1914, p. 2; Carlyle 1950, p. 168).[6]

Manegold "produced a theory of kingship unique in contemporary literature." In his manuscript *Liber ad Gebehardum*, written around 1085, Manegold "maintained that there is a *pactum* between the king and his people, and that the latter owe no obedience to a king who breaks the contract by violating the law (chaps. 30, 47)." Then "with characteristic audacity," Manegold "reinforces this principle by a comparison from humble life" (Stead 1914, p. 8; Van Caenegem 1990, pp. 105–06).

> Manegold compared the tyrant king to a swineherd who was hired to attend to one's pigs, and who was discovered to be butchering them instead of caring for them. In such a case, there would be no question about whether the swineherd should be fired in disgrace, as there should be no question about the appropriate disposition of the tyrannical king. Since the state was based on a contract, a violation of its terms by the king brought about its termination and all obligations on the part of the people similarly came to an end. (Sicker 1981, p. 83)

[6]Manegold might have been prompted by St. Augustine (354–430 A.D.), who had raised the question in *The City of God*: "Without justice, what are the kingdoms but great bands of robbers?" *De Civit Dei*, iv, 4, cited in Stead (1914, p. 5).

However, while Manegold agreed that a king who ruled badly ceased to be a king, he probably did not realize the anarchistic implications of such a position. As one modern commentator noted:

> If the people can decide at any moment, such as when the government imposes new taxes, that the fundamental pact has been broken and rise in revolt, anarchy is bound to be the consequence. (Van Caenegem 1990, p. 106)

Godfrey of Fontaines

In the centuries that followed Manegold, there were other Catholic thinkers who dealt explicitly with questions of consent. Godfrey of Fontaines was born around 1250, and studied liberal arts at Paris under Thomas Aquinas (1269–72). During the late 1280s, he was engaged in a series of public discussions, known as quodlibets, one of which dealt with the question of "whether a ruler can impose a tax, and whether his subjects are bound to pay for it, when he says that it is for the common utility of the state, but when the need for it is not evident." The apparent occasion for the disputation was "the hefty taxes imposed by King Philip the Fair (of France) in order to sustain his wars." According to Brian Tierney (1995, p. 79):

> Godfrey's text included an explicit argument about the right of consent to taxation as an essential attribute of a free society. . . . [W]hen anyone ruled over free persons . . . he ought not to impose any burden on his subjects except with their consent. Because they were free persons the subjects ought not to be coerced. When they paid a tax they should do so voluntarily because they underst[oo]d the reason for the imposition. It was not enough for the ruler to say that he was levying a tax for the common good or by reason of state necessity; if he did not seek consent of the subjects they were not obliged to pay.[7]

Despite Tierney's unqualified interpretation of Godfrey's stance on the importance of "consent to taxation" in the late thirteenth century, other modern commentators have been more circumspect. Thus, Marshall Kempshall pointed out that while

> Godfrey [was] certainly familiar with the Roman maxim "what touches all must be approved by all," (*quod omnes tangit ab omnibus comprobetur*) he [was] careful to keep his options open when it [came] to defining exactly how that approval [could] be registered.

[7]On Godfrey, see Wippel (1981). Also see McGrade, Kilcullen, and Kempshall, eds (2001, trans. 6), and esp. trans. 10: "Godfrey of Fontaines—Are Subjects Bound to Pay A Tax When The Need For It Is Not Evident?"

Further, Godfrey argued that those who refused to pay a just tax should provide restitution to those who did. Godfrey recognized that consent was not the only means "by which extraordinary taxation could be legitimized." In the end, it was "[t]he common good, not consent, [that] remains the ultimate measure of legitimacy" for Godfrey (Kempshall 1999, pp. 253, 255).

Fourteenth-Century Canonists

In his discussion of "Hierarchy, Consent, and the 'Western Tradition,'" Brian Tierney (1987, p. 648) notes that the canonists did not teach that ruling power in the church came from personal holiness or individual wisdom.

> When the canonists asked where jurisdiction came from, they normally emphasized election. In another variation of the *Quod omnes tangit* phrase they held that "he who is to rule over all should be chosen by all." . . . Did ruling authority inhere in certain persons by virtue of their own intrinsic qualities . . . [o]r did licit rulership arise . . . from active consent?

Marsilius of Padua

Reviewing the canonistic responses to this question, Tierney (1987, p. 648) writes:

> Marsilius of Padua (ca. 1325) argued that, because all good government was rule over voluntary subjects, it followed that such government had to be established by consent. Marsilius considered the argument that superior wisdom gave a title to rule and overtly rejected it. A ruler acquired power solely by election, "not by his knowledge of laws, his prudence, or his moral virtue."

Hervaeus Natalis

Just a few years prior to Marsilius, the Master General of the Dominican Order, Hervaeus Natalis, elaborated a similar argument. Hervaeus acknowledged that

> it was indeed fitting that a wiser and better man should rule, but these qualities did not in themselves confer jurisdiction. If such a man tried to seize jurisdiction, he would become wicked in the act of doing so. (Tierney 1995, p. 45)

In 1323, Hervaeus "presented a systematic argument that all licit government must be based on consent of the governed." He questioned how a "ruling authority," such as a king, could arise. It was clear to Hervaeus that jurisdiction did not inhere in any person by nature, because, by nature, all men were equal. If a king held

jurisdiction without consent, he held it by violence. "Then it would not be a licit power, for violent possession conferred no right." According to Tierney, there remained only one possible answer for Hervaeus: "legitimate ruling authority . . . came 'only from consent of the people' (*per solum consensum populi*)" (Tierney 1995, p. 46).

Duns Scotus

Other fourteenth-century canonists concerned themselves with similar problems. Duns Scotus (ca. 1300) argued that "the decision of a prudent man did not in itself bind a community" to do his bidding. "[P]olitical authority was justly derived from 'the common consent and election of the community'." Suppose a group of strangers came together to build a new city, Scotus asked. They would need some sort of rules in order to cooperate. "Hence, . . . [Scotus] suggested, they might all submit themselves by consent to one ruler, or each submit himself to the authority of the whole community" (Tierney 1987, p. 649). He plainly concluded that all political authority, whether it rested in one person or in the community, could "only be justified by the common consent of that community" (Sigmund 1963, p. 139).

Durandus of St. Porcine

Durandus of St. Porcine (d. 1332) viewed the matter in a slightly different manner.

> Even if there were one man in all the world better and wiser than any other person, it would not follow that all should obey his laws. There would always be more wisdom inhering in the whole community than in any one outstanding individual.

Durandus, like Manegold, argued that when a ruler's power "ceased to serve the end of public expediency, it could be revoked" (Tierney 1987, p. 649).

William of Ockham

William of Ockham (1300?–1349?), the English scholastic philosopher of Occam's Razor renown, held that

> legitimate government must be based on consent because "by nature all mortals (are) born free and not subject to anyone else," and "only by an express act of will can one subject oneself to the rule of another."

He also held that

> no community could confer absolute power on a ruler because the community itself did not have absolute power over its individual members. (Tierney forthcoming, pp. 13–14)

Nicolas of Cusa

One of the last and greatest of the conciliarist thinkers of the fifteenth century was Nicholas of Cusa (1401–1464). Nicholas was a prelate and bishop who wrote *De Concordantia Catholica* in the early 1430s to support the work of the Council of Basel. The dominant theme of this tract was "the search for universal harmony" and how it might be established (Sigmund 1963, pp. 7, 21, and 122).

> In one of the most famous passages in his *De Concordantia Catholica*, Nicholas accepts the natural equality of all men. All men are by nature equally free. From this view results his argument that men cannot be submitted to a government except through their own consent. Nicholas saw that every government (*principatus*) . . . is based on agreement (*concordantia*) alone and the consent of the subjects (*consensu subjectivo*). . . . The valid and ordained authority of one man naturally equal in power with the others can not be set up except by the choice and consent of the others. (Watanabe 1963, p. 38)

Although "Nicholas's theory of consent [wa]s not based on the modern concept of natural rights" and largely rested on a belief that "all true and ordained powers are ultimately *a Deo*" (from God), Nicholas believed that "the nature of Christianity . . . excluded all compulsion" (Watanabe 1963, pp. 48, 49). "Consent meant to Nicholas a unanimous agreement of all under the guidance of the Holy Spirit" (Watanabe, p. 187). In this sense, Nicholas embraced the medieval view that the "church was always conceived of as a free society, united by the voluntary consent of . . . [its] members" (Tierney 1982, p. 107).

Wessel of Gansforth

Another medieval thinker whose ideas impacted on consent theory was Wessel of Gansforth, who was born in the Netherlands about 1419 and died in 1489. His major work, *Tractatus de Dignitate et Potestate Ecclesiastica*, written during the later part of his life, is largely of interest because of its emphases on individual conscience, freedom, and responsibility. Ever since St. Augustine wrote *De Civitate Dei*, early in the fifth century A.D., Christian thinkers have argued that men must follow the biblical injunction to "obey God rather than man," and suspend their political allegiance when their national leaders violate divine law. During the Middle Ages, that came to mean that

> the individual believer must place the moral and spiritual guidance of the hierarchically ordered Church ahead of the legal authority of the State (though that was itself a novel departure fraught with revolutionary implications), but also that it may be necessary for him

> *in extremis* to follow the promptings of his own conscience rather than the mandate of any authority whatsoever, including that of the Church. (Oakley 1988a, pp. 213–15)

Gansforth was undoubtedly familiar with the "medieval canonists and moral theologians [who] often upheld the overriding value of the individual conscience as a guide to right conduct." In the twelfth century, Peter Abelard had taught "that to act against one's conscience was always sinful, even if the conscience erred in discerning what was right." A century later, Thomas Aquinas[8] discussed the role and status of conscience in the *Summa Theologica* and *Quaestiones Disputate de Veritate*, and confirmed what Abelard had taught: "A person was always obliged to do what his conscience discerned as good, even though the conscience might be mistaken."

The same doctrine was taught by Pope Innocent III (1198–1216), and incorporated into *The Ordinary Gloss to the Decretals*:

> One ought to endure excommunication rather than sin. . . . No one ought to act against his own conscience and he should follow his conscience rather than the judgment of the church when he is certain. . . . One ought to suffer any evil rather than sin against conscience. (Tierney 1996, pp. 24–25)

Gansforth was surely familiar with the words of Innocent III, who taught that "under certain circumstances, one must humbly accept excommunication at the hands of one's ecclesiastical superior, rather than go against one's conscience by obeying him" (Oakley 1988a, p. 214).[9] Gansforth takes

> for granted the traditional Christian teaching that the individual conscience may set a negative limit on the extent to which those in authority can oblige us to obey. What he is at pains to make clear . . . is that the conscience must exercise that prerogative, not only in relation to the princes and potentates, emperors and kings of this world who exercise a civil authority, but also in relation to popes, bishops, and other religious superiors whose authority is ecclesiastical.

In

> addressing the issue of "how far subjects are obliged to obey their prelates and superiors" and advancing an argument that he specifies as applying also to kings and civil magistrates, Gansforth portrays the relationship between subject and ruler as a contractual

[8]Tierney (1996) cites Thomas Aquinas, *Summa Theologiae* 1.2ae.19.5.

[9]Aquinas and various other canonical authorities are cited here.

> one, conditioned by the law of contracts (*lex pactorum*) and grounded in free consent.

Reminiscent of Manegold of Lautenbach, Gansforth

> goes on to argue that *if* the ruler breaks the terms of the contract, then the subject's obligation ceases and the ruler should be deposed. (Oakley 1988a, pp. 219–20; emphasis in original)

Bartolome de Las Casas

The ideas about consent that were discussed by Wessel of Gansforth and other medieval thinkers, though often radical in their implications, were not usually thought of in that manner. However, the Spanish Dominican missionary and historian Bartolome de Las Casas (1474–1566) actually took them to their logical conclusion.

> The whole of Las Casas's life work was inspired by a conviction that the Indians [of the New World] could be converted to Christianity only by peaceful persuasion without any violence or coercion. In defending the Indians, he emphasized their natural right to liberty. (Tierney 1997, p. 272)

Brian Tierney describes Las Casas's radicalism as based on liberty

> more precious and priceless than any riches a people might possess. In the *De Regia Potestate*, the Dominican . . . defended a right to property and right to institute rulers by consent as ancillary to the fundamental right of liberty. (Tierney 1997, p. 272)

Las Casas[10] argued that a ruler's jurisdiction over his subjects did not extend to ownership of their property.

> [S]ince, in the beginning, all people were free, the authority of a ruler could only be derived from their voluntary consent—otherwise they would be deprived of the liberty that belonged to them by natural right. It followed, too, that a ruler could not impose taxes or other burdens unless the people voluntarily consented; they did not lose their liberty when they elected a ruler. (Tierney 1997, pp. 280–82)

Las Casas challenged the right of the Spaniards to rule over the Indians of Central America. He chose the legal phrase *quod omnes tangit* (whatever touches all is to be approved by all) to protect the Indians. When asked how Spanish rule over the Indians could become legitimate, Las Casas cited the same canonistic text (X.1.2.6) that Ockham had used: "No community could confer absolute

[10]For more on Las Casas, see Watner (1987, pp. 298–306).

power on a ruler because the community itself did not have absolute power over its individual members" (Tierney forthcoming, p. 39). Tierney (1991, pp. 302–03), in describing Las Casas, writes:

> Whenever a free people was to accept some new obligation or burden, he explained, it was fitting that all whom the matter *touched* should be summoned and freely consent. Then, Las Casas added, echoing earlier canonistic doctrine, that a group of people could have a right either as a corporate whole or as separate individuals. In the first case, the consent of a majority was sufficient; in the second case, the consent of each individual was required. Las Casas maintained that this latter kind of consent—*omnes et singuli*—was needed to legitimize Spanish rule over the Indians. The consent of a whole people could not prejudice a single person withholding consent. Especially where liberty was concerned, the case was *common to all and many as single individuals.* It would detract from the right of each one (*juri uniuscuiusque vel singulorum*) if they all lost sweet liberty. Rather than a majority prejudicing a minority, in such a case, the opinion of the minority dissenters should prevail. (Emphasis in original)

Las Casas's argument is stronger than most anything from the Levellers in the next century, arguably stronger than anything from the pen of John Locke, and arguably more radical than the Declaration of Independence or any document emanating from the American Revolution against Britain. It is poignant that such views were developed by a Catholic thinker, much of whose life was devoted to the study of medieval theology, and who made "the doctrine of natural equality and freedom" of man and woman—"as old as the Stoics"—the very foundation of his thinking (Oakley 1981, p. 798).

CONCLUSION

If we argue that freedom flourished in the West as nowhere else in the world, then it is easy to identify the medieval Catholic Church as a nearly unique causative factor. Despite its negative attributes, the Church made some very important contributions to Western freedom. Principally these were:

> a limitation of state power, especially in matters of religion; a well-developed theory of consent as the basis of legitimate government; new techniques of representation; [and] a nascent theory of natural rights. (Tierney 1995, p. 100)[11]

[11]In the same essay, on p. 69, Tierney observes that the continual failure of either the Church or the European kings to control the other "encouraged

The institutional dualism of the medieval ages, represented on the one hand by the Church, and by the State on the other, marked

> the birthpangs of something new in the history of mankind: a society in which the state was stripped of its age-old religious aura and in which its overriding claims on the loyalties of men were balanced by a rival authority. . . . [I]t was in the interstices of a fragmented political world that private economic enterprise found room in the Middle Ages to grow. To that it must now be added that it was between the hammer and the anvil of conflicting authorities, religious and secular, that Western political freedoms were forged. Medieval constitutionalism was the product of many mutually supportive factors, by no means all of them religious; but whatever the strengths of those factors, without the Christian insertion of the critical distinction between the religious and political spheres, and without the instability engendered as a result by the clash of rival authorities, it is extremely unlikely that the Middle Ages would have bequeathed to the modern world any legacy at all of limited constitutional government. (Oakley 1998b, pp. 114–15)

It probably never entered into the minds of any medieval thinkers that the concept "limited government" could be a contradiction in terms. Despite the arrestingly modern intonations of the more radical of the medieval consent theorists, medieval consent was always conditioned on the presupposition that some sort of authority must exist and that political rulership was natural to man (Oakley 1983, p. 234).

To argue, as Brian Tierney has, that so far as constitutional theory is concerned, the period from the late twelfth century to the late seventeenth century is a single historical epoch which embraced consent theory as the basis of legitimate government, is to miss the point that there would probably never be any legitimate government if governments had to rest upon true, uncoerced consent (Oakley 1981, p. 806). Radical libertarians of the past century and a half understood this. Their forebears, like Marsilius of Padua, William of Ockham,

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theories of resistance to tyranny and of constitutional limitations on government." Tierney (1987, p. 650) notes that this conflict between popes and kings helps explain "why Western culture developed a political tradition radically different from that of all the other great world civilizations." On the negative attributes of the medieval Catholic Church, see Southern (1970). Although admitting that the Church was "weak in the means of coercion," Southern (pp. 17–20), points out that "the church was a compulsory society in precisely the same way as the modern state is a compulsory society," and that infant baptism was an involuntary joining of the individual to the Church.

Hervaeus Natalis, Nicholas of Cusa, and the rest of the historical figures cited here did not. Thus, Brian Tierney was right in lumping many centuries of medieval consent theorists together.

However, Tierney should not have stopped with Bartolome de Las Casas, Richard Overton, and John Lilburne from the seventeenth century. Each century that has followed has had its own radical adherents to consent theory. Josiah Tucker from the eighteenth, Benjamin Tucker and Lysander Spooner from the nineteenth, and Murray Rothbard and Hans-Hermann Hoppe from the twentieth are just a few of the thinkers who have fleshed out the implications of consent theory as it evolved into individualist anarchism. Thus, it should be perfectly clear to any one who reviews the history of consent theory that "to contend that individual consent is the moral justification for government is to lay the groundwork for anarchy" (Smith cited in Watner 1986, p. 112).

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